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IN THE

Filed Nov. 7, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLOBY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI.

No. 181.

In Error to the Supreme Court of Missouri.

STATEMENT, BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

GEO. P. B. JACKSON,
For Plaintiff in Error.

Nixon-Jones Printing Co., 215 Pine St., St. Louis. J

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,
vs.
H. W. HICKMAN, JAMES COWGILL AND JOSEPH FLORY, CONSTITUTING THE BOARD OF RAILROAD AND WAREHOUSE COMMISSIONERS OF THE STATE OF MISSOURI. } No. 127.

In Error to the Supreme Court of Missouri.

STATEMENT.

The writ of error in this case is prosecuted to reverse a judgment of the Supreme Court of the State of Missouri affirming a judgment of the Circuit Court

of Cooper County, in that State, rendered under the following circumstances: —

In August, 1895, the plaintiffs commenced a suit returnable to the October Term, 1895, of the Circuit Court of Cooper County, Mo., to enjoin the defendant from making certain charges on passengers and freight crossing the bridge over the Missouri river at Boonville (Rec., pp. 10–12).

Within due time the defendant filed petition and bond in proper form for removal of the case to the United States Court on the ground that the defendant was, as is alleged in the original petition, as well as in the petition for removal, a citizen of the State of Kansas, while the plaintiffs were citizens of the State of Missouri (Rec., pp. 12 and 13).

At the October Term, 1895, the Circuit Court of Cooper County made the following order concerning the petition for removal: —

"The petition for the removal of this cause to the United States Court heretofore filed is now by the court overruled."
(Rec., p. 14.)

Thereupon the defendant procured, and in due time filed in the United States Circuit Court at Jefferson City, a transcript of the proceedings in the case in the Cooper Circuit Court. Thereafter the defendant did not farther appear in the case in the Cooper Circuit Court, and subsequently to the action just mentioned the Cooper Circuit Court, without

any participation therein by the defendant, made an order at the January Term, 1896, continuing the case until the next term of that court, nothing farther was done in the State court for more than a year, and then at the May Term, 1897, the defendant still not appearing or participating, the court made an order again continuing the case until the next term of that court upon the application and request and at the costs of the plaintiffs (Rec., pp. 14 and 15).

During all this time the case was pending in the United States Court, upon an order requiring the plaintiffs to reform their pleadings in accordance with the equity rules prevailing in that court, and was being continued from term to term by agreement to accommodate the plaintiffs. Neither the defendant nor its attorney had any knowledge that any orders of continuance had been made in the State court, or that there was any intention to insist upon a trial in that court, until it was accidentally discovered just prior to December 3d, 1897, that the plaintiffs with their attorneys had gone to Boonville to try the case without any notice of any such intention to the other side. The defendant's attorney, by reason of other engagements, not being able to remain in Boonville, prepared a written protest and left the same to be filed, which was done when the case was called on the 3d of December, the defendant appearing specially only for that purpose.

Notwithstanding the same, the court took up the case for trial and made an order formally overruling,

denying and disregarding the protest and directing the trial to proceed; to which action the defendant excepted. This protest is set forth at length in the judgment (Rec., pp. 15 to 19).

The plaintiffs introduced evidence which they claimed tended to sustain the allegations of their petition. The defendant did not introduce any evidence and only appeared for the purpose of formally presenting the protest and renewing the objections at the time the evidence was offered, and to call to the attention of the court that under the circumstances set forth in the protest no answer had ever been filed in that court, when the objections were again overruled and defendant excepted (Rec., p. 21).

Upon the conclusion of the evidence the court made a finding and entered judgment for the plaintiffs.

Within due time the defendant filed a motion for new trial and also a motion in arrest of judgment (which motions are set forth at length at pages 45 to 46 of the printed record), and among other grounds assigned the following: —

"It appears from the record in the case that due and lawful proceedings had been taken for the removal of the same (this case) to the United States court for the Central Division of the Western District of the State of Missouri, and that a transcript of the proceedings therein had been filed in said last named court where the case is now pending."

Both motions were overruled and exceptions duly saved (Rec., pp. 45 and 46).

Thereafter, in accordance with the leave given, the defendant filed its bill of exceptions and duly prosecuted its appeal to the Supreme Court of the State of Missouri (Rec., p. 47).

The attorney for the defendant in error here, as respondents in the Supreme Court of Missouri, filed their brief in answer to the brief previously filed in accordance with the rules of that court by the appellant, and then for the first time raised the question, which is now presented to this court, for determination, namely: that the State of Missouri was the real party to the suit, brought in the name of Hickman et al., constituting the Board of Railroad Commissioners, and that therefore the case was not removable to the United States Court. The Supreme Court of the State, attempting to distinguish the case at bar from cases decided by this court, sustained that contention, and held that the State of Missouri was the real party, and that therefore the case was not removable, and on May 1st, 1899, a judgment was rendered affirming the judgment of the Circuit Court of Cooper County, Missouri (Rec., p. 47).

At the same time the court handed down and filed in the case an opinion which is fully set forth in the transcript of the record at pp. 47 to 57 as follows: —

In the Supreme Court of Missouri, April Term, 1899. Court in Banc.

H. W. Hickman et al.,
Respondent,

vs.

Mo. Kan. & Tex. Ry. Co.,
Appellant.

OPINION.

This is an appeal by the defendant from a decree and judgment of the Circuit Court of Cooper County, in favor of the plaintiffs.

At the time the suit was instituted the plaintiffs constituted the Board of Railroad and Warehouse Commissioners of the State of Missouri.

The petition is as follows: —

H. W. Hickman, James Cowgill and Joseph Flory, constituting the Board of Railroad and Warehouse Commissioners of the State of Missouri,
Plaintiffs,

vs.

The Missouri, Kansas & Texas Railway Company,
Defendant.

Plaintiffs state that they are the regularly elected, duly qualified and acting railroad and warehouse

commissioners of the State of Missouri and constitute the board empowered by law to classify and regulate passenger and freight rates in the State of Missouri. That the defendant is a railroad corporation duly incorporated under the laws of the State of Kansas and authorized to do business in the State of Missouri; that said defendant owns and operates a line of railroad in this State, a portion of the main line of which is located in the county of Cooper, State of Missouri, and extends from said county across the Missouri river over a bridge to the county of Howard, in the State of Missouri; that said bridge over which said railroad is constructed is a part of the roadway of the same and is used as such; that said bridge is under the control and management of said defendant; that informal complaints have heretofore been made to plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid, that arbitrary, illegal and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passes over said bridge; that plaintiffs under the authority given them as the Board of Railroad and Warehouse Commissioners aforesaid, proceeded, on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said

bridge than is authorized by law; that said defendant belongs to the class of railroad corporations designated by the laws of the State of Missouri as "Class A;" that said class is only authorized to charge passengers at the rate of 3 cents per mile each; that said Boonville Bridge is not exceeding one mile in length; that said defendant charges for carrying each local passenger over said bridge the sum of three cents per mile; that in addition thereto the said defendant makes an arbitrary charge of 25 cents for carrying each local passenger on its line of railway over said bridge; that said charge of 25 cents so made, demanded and received of each local passenger by said defendant is illegal, improper and unauthorized by law; that said defendant charges and collects on freights transported over said bridge and between local stations upon the line of its railway in addition to the duly established rates for such transportation, as shown in tariffs filed in the office of said Railroad and Warehouse Commissioners the sum of five (5) cents per one hundred pounds on freights in lots of less than car loads, and two cents per one hundred pounds on freights in car loads. That said charges so made, demanded and received are excessive, unauthorized and in violation of law.

That on the 22d day of July, 1895, plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid, after having duly considered the complaints heretofore filed against the defendant as aforesaid, found that the same were sustained by proper and sufficient evidence and made and entered

of record an order directed to the said defendant railway company that the arbitrary charges made by defendant for crossing passengers and freight over the bridge at Boonville, Missouri, aforesaid, be discontinued, and that a copy of said finding and order was by said plaintiffs forwarded to the general manager of said defendant's road.

Plaintiffs state that they are informed and believe the fact to be that the defendant is disregarding and ignoring said order and is continuing in violation of law to charge, demand and receive rates in excess of three cents per mile for carrying each passenger over that portion of its road which consists of said bridge, and that said defendant continues to charge, demand and receive freight rates in excess of those authorized by law for carrying freight on that portion of its road of which said bridge over the Missouri river at Boonville constitutes a part.

Plaintiffs therefore ask that this court may issue a writ of injunction herein or such other process, mandatory or otherwise, as may seem necessary in the premises to restrain said defendant from further continuing to violate the law and the finding of said plaintiffs herein, acting as the Board of Railroad and Warehouse Commissioners, aforesaid, that obedience to said order may be required of defendants and that such other and further orders and decrees may be made in this cause as may be seen upon a hearing to be right and proper in the premises.

R. F. WALKER.
Attorney-General, for Plaintiffs.

In due time the defendant appeared and filed its petition and bond for the removal of the cause to the Circuit Court of the United States. The petition being as follows: —

Your petitioner respectfully shows that it is the defendant in the above entitled suit; that at and prior to time of the institution of this suit the defendant was, ever since has been, and now is a corporation created and existing under the laws of the State of Kansas; and that at said times and dates, it was, has been, and now is a citizen of the State of Kansas, and non-resident of the State of Missouri, in which this suit is brought; that the plaintiffs in said suit, at the time of the institution thereof, all and each were, ever since have been and now are citizens and residents of the State of Missouri.

That the said suit is of a civil nature to enjoin the collection of certain charges for the transportation of passengers and freight over and across a bridge across the Missouri river, between the counties of Cooper and Howard, in the State of Missouri, and that the amount and matter in dispute in said suit exceeds, exclusive of interest and costs, the sum and value of two thousand dollars ($2,000).

That the controversy in said suit is wholly between citizens of different States, to wit: between your petitioner, a citizen of the State of Kansas at the time of the bringing of said suit and at this time, and the said plaintiffs, who, each and all of them, were then, and still are citizens of the State of Missouri, and your petitioner offers herewith a bond,

with good and sufficient security, for its entry in Circuit Court of the United States for the Central Division of the Western District of Missouri, on the first day of the next regular session or term, of a copy of the record in this suit, and for paying all costs that may be awarded by the Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto, and your petitioner prays this Honorable Court to proceed no farther herein, except to make an order for the removal of this case to said United States Circuit Court, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Central Division of the Western District of Missouri, and it will ever pray.

At the October Term, 1895, of the Circuit Court of Cooper County, the defendant's petition for removal was denied, and thereupon the defendant procured and filed in the United States Circuit Court at Jefferson City a transcript of the proceedings in the Cooper Circuit Court. At the January Term, 1896, of the Cooper Circuit Court the case was continued by the court on its own motion. At the May Term, 1897, of the said court, the case was again continued, on application of the plaintiff, to the October Term, 1897, of said court. At which Term, the case, over the protest of the defendant, and its objections to the jurisdiction of said court, was taken up and tried on the evidence of the plaintiffs, without any participation by the defendant in the trial,

and the decree rendered as prayed for in their petition with judgment for costs. Afterwards, in due time, the defendant filed its motion for new trial, and in arrest of judgment, which being overruled, it perfected its appeal to this court.

I.

Under the laws of the United States, the Circuit Courts thereof have original cognizance, concurrent with the courts of the several States of all suits of a civil nature at common law, or in equity, when the matter in dispute exceeds, exclusive of interest, the sum or value of two thousand dollars, and in which the controversy is between citizens of different States (25 U. S. Stat. at Large, p. 434, Sec. 1). Any such suit pending in a State court "may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein; being non-residents of that State" (*Ib.*, Sec. 2).

And by Sec. 3 of said Act it is provided that whenever any party entitled to remove any such suit, "may make and file a petition in such suit in such State at the time or at any time before the defendant is required by the laws of the State or the rules of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff. * * * and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court on the first day of its then next session, a copy of the record in such suit, and for paying all costs that

may be awarded by the said Circuit Court, if such court shall hold that such suit was wrongfully or improperly removed thereto, and also from their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall be the duty of the State court to accept said petition and bond and proceed no further in such suit." * * *

It is contended for the defendant, that when the petition and bond for removal was filed in the case, in the Cooper County Circuit Court, the jurisdiction of that court to take any further proceedings therein except to make an order transferring the case to the Circuit Court of the United States, ceased, and that its proceedings thereafter which culminated in the decree aforesaid was *corum non judice* and void, therefore the decree and judgment should be reversed.

It may be conceded that the petition and bond for removal are in proper form and that the petition states facts which if true are sufficient to authorize the transfer of the case to the Circuit Court of the United States under the statute cited, and it may be further conceded that an issue upon the facts stated in the petition could not be raised and tried in the State court for the purposes of determining the question of its jurisdiction. The State court " must take the facts to be as they are stated in the record and the petition; it has no jurisdiction to pass upon any such question; that is the exclusive province of the Federal court." Black's Dillon on Removal of Causes, § 191, and cases cited 30. The jurisdiction

of the State court, however, is not ousted by the mere filing of the petition and bond. "In order to warrant a removal from a court of a State into a Circuit Court of the United States according to the terms of the Act, the necessary diverse citizenship must exist." Powers v. Chesapeake & Ohio Railway, 169 U. S. 92.

The petition when filed becomes a part of the record and the defendant's right of removal depends upon the facts as they appear from the whole record. Stone v. South Carolina, 117 U. S. 431. As was said by Waite, C. J., in that case: "A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made which on its face shows that the petitioner has a right to the transfer. Yulee v. Vose, 99 U. S. 539, 545; Removal Cases, 100 U. S. 457, 474. It is undoubtedly true, as was said in Steamship Company v. Tugman, 106 U. S. 118, 122, that upon the filing of the petition and bond — the suit being removable under the statute — the jurisdiction of the State court absolutely ceases, and that of the Circuit Court of the United States immediately attaches, but still, as the right of removal is statutory, before a party can avail himself of it, he must show upon the record that his is a case which comes within the provision of the statute. As was said in Insurance Company v. Pechner, 95 U. S. 183, 185, "his petition for removal when filed becomes a part of the record in the cause. It should state facts which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not,

in law, shown to the court that it cannot 'proceed further with the suit.' Having once acquired jurisdiction, the court may proceed until it has been judicially informed that its power over the cause has been suspended." The mere filing of a petition for the removal of a suit, which is not removable, does not work a transfer. To accomplish this the suit must be one that may be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record, and the necessary security having been given, the power of the State court in the case ends and that of the Circuit court begins.

All the issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal, and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under section 709 of the Revised Statutes. Removal cases: 100 U. S. 457, 472; Railroad Co. v. Mississippi, 102 U. S. 135, 141; Kerr v. Huidekoper, 103 U. S. 485; Railroad Co. v. Koontz, 104 U. S. 15; Chesapeake & Ohio Railroad Co. v. White, 111 U. S. 134, 137. If the State court proceeds, after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction."

So that the question whether a removal would

be effected by the filing of the petition and bond remained to be decided by the Cooper Circuit Court, on the face of the record as made up, after the filing of the same, and unless judicially informed by the record so made, that the suit was removable, it might proceed in the exercise of its jurisdiction.

The fact stated in the petition for removal that would entitle the defendant to the removal, was that the plaintiffs are citizens of the State of Missouri, and the defendant is a citizen of the State of Kansas. Now, while this fact is not to be disputed, but taken as true, it further appears from the record that "the controversy" inaugurated by their petition is not between them in their individual character as citizens of the State of Missouri and the defendant, but in their official character as members of "The Board of Railroad and Warehouse Commissioners of the State of Missouri." Hence, it is argued, for the respondents by the Attorney-General, that the controversy is not between citizens of different States but between the State of Missouri and a citizen of the State of Kansas, and as the statute does not authorize the removal of a suit between a State and citizens, and a State cannot be a citizen of any State; that it thus appears from the record that the case was not removable under the statute; the jurisdiction of the Circuit Court of Cooper County was not divested by the application for removal; and it committed no error in proceeding with the case to final judgment. This presents the crucial question on this appeal.

Is this a suit by the State of Missouri against the

defendant? If so, then, beyond question, the case was not removable to the U. S. Court, and the Circuit Court of Cooper County was not divested of its jurisdiction; for it is well settled law that "A suit instituted by a State in one of its own courts against a citizen of another State is not removable to the Circuit Court of the United States on the grounds of diversity of citizenship of the parties." (State of Ala. v. Wolfe, 18 Fed. Rep. 836; Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482; State v. South Carolina, 117 U. S. 143; Germania Ins. Co. v. Wisconsin, 119 U. S. 473; Ames v. Kansas, 111 U. S. 449.)

Although the State of Missouri is not a nominal party to the suit; yet if it is the real party in interest, the controversy is between the State and the defendant, and the Federal statute does not apply; and the question whether the State is the actual party to the controversy must be determined by a consideration of the whole record. (In re Ayres, 123 U. S. 443; Carson v. Hyatt, 118 U. S. 279; Hagard v. Southern, 117 U. S. 52; Maryland v. Baldwin, 112 U. S. 490.) The law looks to "things, not names; to the actors in controversies and suits, not to the mere forms or inactive instruments used in conducting them, in virtue of some positive law." (McNutt v. Bland, 2 How. 9.)

The positive law authorizing this action is Sec. 2653, R. S. 1889. The provisions of which, bearing upon the present inquiry, are as follows: "Where the complaint involves either a private or a public question, as aforesaid, and the commis-

sioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent or employe thereof, shall violate, refuse or neglect to obey, any such order or requirement, it shall be lawful for the board of railroad commissioners, or any person or company interested in such order or requirement, to apply in a summary way, by petition, to any Circuit Court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of, as the court shall deem reasonable. * * * and if it be made to appear to the court on such hearing * * * that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. * * * And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors,

officers or agents, of the same, or against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. * * * Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general when requested by said commissioners, to prosecute the same. * * * The costs of such proceedings may be, with the approval of the attorney-general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid i h e first instance out of any money in the treasury not otherwise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being

prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case."

By section 2658, it is further provided that: "To defray the necessary expenses of the railroad commissioners in making investigations and prosecuting suits, and to pay all necessary costs attending the same, there is hereby appropriated, out of any money in the State treasury not otherwise appropriated, the sum of ten thousand dollars, to be drawn upon the warrant of the State auditor, issued upon requisition of the railroad commissioners, approved by the governor, which requisition shall be accompanied by an itemized statement of the costs and expenses to be paid."

The general rule is that "When the plaintiff has no real interest in the subject-matter of the controversy, and can derive no advantage from the judgment, but the suit is required to be brought in his name because he holds the formal right to sue, although the action is really prosecuted for the benefit of another, the record plaintiff is only a nominal party, whose citizenship will not affect the right of removal; such right will depend upon the relative citizenship of the real party in interest." Black's Dillon on Removal of Causes, Sec. 86.

Under this statute the suit is brought in the name of the "Board of Railroad Commissioners" because they hold the formal right to sue, but the members of that board neither individually nor collectively, have any interest in the subject-matter of the controversy, and can derive no advantage or benefit,

nor suffer any injury or loss from the judgment therein. In Ferguson v. Ross, 38 Fed. Rep. 161, holding that an action under the laws of New York in the name of "the Shore Inspector" to recover a penalty for depositing prohibited material in the waters of the bay and harbor of New York, which penalty, when recovered, goes into the State treasury, is in effect an action by the State, and therefore not removable under the Act of Congress in question. It was said: "The nominal plaintiff here is an individual, but he sues only in his official chatacter. The suit is brought to enforce a police regulation of the State. He has no personal interest in its subject-matter, not even for his fees or commission, for he is a salaried officer whose compensation is secured irrespective of the result of the suits he may bring. In the event of his removal from office the suit would be continued by his successor, not by himself. Courts will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit, and will determine whether a State is the real party to an action brought by or against its officer by a consideration of the whole record" (citing authorities); "the real party prosecuting these suits is the State of New York and they are therefore not removable under the Act of 1887. On the other hand in Regan v. Farmers Loan & Trust Co., 154 U. S. 362, holding that a suit in equity against the railroad commissioners of the State of Texas, assented to by that State, in the act creating the commission, was not a suit against the State. It was said: "So far from

the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character, and as an individual employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense.

It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws, but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property be affected by any decree which may be rendered." While neither of these cases, upon the facts in judgment for obvious reasons, can be regarded as direct authority in the present case, an analogue of which cannot perhaps be found in the reports, much reliance is placed upon the reasoning in each by counsel respectively. The attorney-general contending that the case in hand is within the reasoning of the first and counsel for defendant that it is within the reasoning of the last. So these cases may serve, if not for authority, at least as pointers to a proper solution of the question of "real interest" under this statute.

The State in its governmental capacity having in

previous sections of the statute, made provision for regulating the rate and charges of common carriers for carrying passengers and freight, and provided for a hearing before its Board of Commissioners of all complaints for a violation of those regulations, and that the finding of the Board shall be *prima facie* evidence of the reasonableness and justness of the charges by it found, and required. In this section the statute makes provision for a civil action to enforce the requirement in behalf of two classes of persons, first "the board of railroad commissioners," second "any person or company interested in such order or requirement." Now while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under this statute by persons of the second class, its board of railroad commissioners. In such actions it abandons its governmental character, enters a court of competent jurisdiction as a suitor under the law, incurs the same liability for costs and expenses as does any other suitor, to be paid under the express provision of the statute, out of any money in the treasury not otherwise appropriated, and is, moreover, pecuniarily interested, not only by reason of the liabilities it incurs in the action but because of its pecuniary interest in the judgments which may be obtained and which when pushed to final extremity of execution, may result in the payment of penalties, not directly into the State treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the pub-

lic schools to the establishment and maintenance of which its credit is pledged by the organic law. It seems to us, therefore, that the State, in addition to its governmental, has a real pecuniary interest in the subject-matter of this controversy and that the suit is being prosecuted for its benefit in every sense, and is not subject to removal to the United States Court, and we so hold.

(2) Counsel for defendant in his reply brief contends that the judgment should be reversed, because the Circuit Court of Cooper County proceeded to trial when the defendant had no reason to expect that a trial would be insisted upon. It appears from the record that the cause came on for trial in the Cooper Circuit Court in due course nearly two years after defendant's motion for a removal to the United States court had been overruled. By the overruling of that motion, the defendant was advised in the most direct and formal manner that the Circuit Court of Cooper County intended to maintain its jurisdiction to try and determine this cause in due course.

Thereupon it chose to stand upon its motion, filed a transcript of the proceedings of the Cooper Circuit Court, in the United States Circuit Court, and thereafter persistently maintained that the case had been transferred; that the Cooper Circuit Court had no jurisdiction to proceed further therein and neglected to make any preparation for its trial in said court, up to the very day of the trial, when it filed a written protest, in which, protesting in the strongest terms against the jurisdiction of that

court, it asked the court to suspend further action until the next term of court in order that the defendant might have sufficient time "to establish that this court has no jurisdiction to proceed in this cause, or to entertain jurisdiction over the same; or if the court shall hold that it has such jurisdiction, then to enable the defendant to determine what course it will pursue, and whether or not it will submit to the jurisdiction of the court, or whether it will take part in the proceedings of the case, still protesting against the jurisdiction of the court, or whether it will refuse to appear and take any part in the proceeding." The court had long since held that it had jurisdiction, and we know of no law or rule of practice by which courts are required to delay the exercise of their jurisdiction until suitors shall have made up their minds as to whether they will submit to it or not. The court committed no error in proceeding with the trial without giving heed to this protest. The judgment of the Circuit Court is affirmed. All concur.

THEO. BRACE, J.

The appellant railroad company unsuccessfully moved for a rehearing of the case. (Rec., pp. 57 to 59.) And thereupon filed assignment of errors in the Supreme Court of Missouri. (Rec., pp. 61 and 62.) And also presented to the Chief Justice of the Supreme Court of Missouri a petition for writ of error and for supesedeas, assignment of errors, citation, etc., in order to bring the case here. Thereupon his Honor, James B. Gantt, Chief Justice of

the Supreme Court of the State of Missouri, allowed the writ of error to this court, (Rec., p. 1.) and duly signed the citation (Rec., p. 2) and also signed the order for supersedeas and approved the bond. (Rec., pp. 63 and 64.) It is not considered necessary to trouble the court by referring to the ex parte evidence introduced in the Circuit Court of Cooper County, Missouri, except to say concerning it, that it established more clearly the theory upon which the suit was brought, as alleged in the petition, namely, that the supposed grievance which occasioned the suit was the exaction of excessive freight charges from certain shippers who lived in Boonville, and that these individual shippers had made complaint to the plaintiffs and had thus caused this suit to be brought to afford relief to these complaining parties, and also to show that the railroad company contended, first, that the plaintiffs, assuming to act as Railroad Commissioners, had wholly disregarded the statute of the State, and had not conducted any proceedings in accordance therewith, and that moreover the charges complained of were not collected by the railroad company as freight charges for transportation by it, but as tolls for crossing the bridge over the Missouri river owned by a separate and distinct corporation, which was authorized by act of Congress and by the State of Missouri to construct and maintain the bridge and to collect tolls for the crossing of passengers and freight over the same. The defendants in error (plaintiffs in the suit in the State court) were the individuals who constituted the Board of Railroad Commissioners of the State of

Missouri. Under these facts and circumstances the question now submitted to this court is, was the case removable to the United States court? Or, in other words, did the Circuit Court of Cooper County, Missouri, have jurisdiction to proceed with that case and to render the judgment which was affirmed by the Supreme Court of the State? And this depends upon the farther question, was the State of Missouri in fact the real party to the suit instituted in the Circuit Court of Cooper County, Missouri, and did such fact so appear upon the record as to justify the State court in maintaining jurisdiction and proceeding to the determination of the case.

GEO. P. B. JACKSON,
For Plaintiff in Error.

ASSIGNMENT OF ERRORS.

The Supreme Court of the State of Missouri erred: —

I.

In holding and deciding that the State of Missouri was in fact a party to this cause.

II.

In holding and deciding that the State court had authority or jurisdiction to investigate and inquire under the circumstances of this case whether or not the said State of Missouri was in effect the real party to this suit.

III.

In holding and deciding that the provision of the statute of the State of Missouri for defraying the expenses incurred by the railroad commissioners in that suit rendered said State of Missouri liable for the costs of this case, so as to make it the real party in interest.

IV.

In holding and deciding that the possibility of the State of Missouri being entitled to recover a penalty under some contingency subsequent to or which might possibly arise on account of a violation of the judgment that might be rendered in this case gives the State of Missouri such a monetary interest in the result of this case as to make it in effect the real party in interest.

V.

In holding and deciding that the case of Reagan et al. v. Farmers' Loan and Trust Company, 154 U. S. 362, was not conclusive of the questions presented in this case.

VI.

In holding and deciding that the laws of the State of Missouri authorized the proceeding commenced by the plaintiffs Hickman, Cowgill and Flory against the Missouri, Kansas & Texas Railway Company in the Circuit Court of Cooper County, Missouri.

VII.

In holding and deciding that this case was not removable from the Circuit Court of Cooper County, Missouri, to the Circuit Court of the United States of the Central Division of the Western District of Missouri.

GEO. P. B. JACKSON,
For Plaintiff in Error.

BRIEF.

I.

The Circuit Court of Cooper County was without jurisdiction to try and determine this case. Therefore, the judgment of the Supreme Court of Missouri affirming the judgment of the Circuit Court, should be reversed. When the petition and bond for removal were filed the State court had nothing to do except to make an order transferring the case to the Federal court. The making of such order was not essential to the jurisdiction of the Federal court.

Shepherd v. Bradstreet, 65 Fed. 142.

The language of the Act of Congress, after providing for filing the petition and bond in the State court, is as follows: "It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

Act of Congress, March 3, 1887, Sec. 3.

When the proper application for removal is made, the jurisdiction of the State court ceases, whether that court grants or refuses an order of removal. After that the farther proceedings in the State court are "*coram non judice*, and absolutely void."

Virginia v. Rives, 100 U. S. 313;
Stanley v. R. R., 62 Mo. 508;
Berry v. R. R., 64 Mo. 533;
Black's Dillon on Removal of Causes, Sec. 192.

II.

If the State court still assumes to exercise jurisdiction, the party seeking the removal may still continue in the State court and make defense and does not thereby prejudice his right to insist on removal and on the jurisdiction of the Federal court.

Black's Dillon on Removal of Causes, Sec. 193.

If under such circumstances judgment is rendered against him in the State court, and on appeal the same is affirmed in the State Supreme Court, then this court will, on writ of error, reverse the judgment of the State court, because there was no jurisdiction in that court to render any judgment.

Oakley v. Goodnow, 118 U. S. 43;
R. R. v. Dunn, 122 U. S. 513;
Powers v. R. R., 169 U. S. 92–102.

III.

The State courts were without jurisdiction to pass upon the question of removability of the case, because it is conceded that it does not appear *upon the face* of the papers that the State has any interest, but that is to be ascertained, if it can be, by an investigation, and by going beyond the nominal parties. The Federal court alone has power to make that investigation of what exists outside the record.

Black's Dillon on Removal of Causes, Secs. 191 and 192;
R. R. v. Dunn, 122 U. S. 513;
Carson v. Hyatt, 118 U. S. 279;
R. R. v. Daughtry, 138 U. S. 298.

IV.

The State is not a party to this suit, and has no pecuniary interest in it. It has no more interest in this controversy than it has in having the law enforced in any case. The case was therefore removable to the Federal court and the State courts had no jurisdiction over the case after the filing of the petition and bond for removal.

Reagan v. Farmer's Loan & Trust Co., 154 U. S. 362;
Pennoyer v. McConnaughy, 140 U. S. 1;
Hickman v. M. K. & T. Ry. Co., 97 Fed. 113.

V.

The statute of Missouri, under which this suit was commenced, negatives the contention that the State is a party to the proceeding.

R. S. of Mo. 1889, Sec. 2653;
Hickman v. M. K. & T. Ry. Co., 97 Fed. 113.

That statute, as well as the petition in the case, shows that the suit was commenced and prosecuted for certain complaining citizens living in Boonville, Mo., and that the present defendants in error were expressly authorized by the statute to maintain the suit for the benefit of such citizens.

Under such circumstances the defendants in error were to be regarded in the nature of trustees of an express trust, and could maintain the suit in their own names, without joining or naming the persons for whose benefit they sued.

R. S. of Mo. 1889, Sec. 1991.

The jurisdiction of the Federal court, and consequently the right to remove a case, depends on the citizenship of administrators, executors, trustees, receivers and others similarly situated.

New Orleans v. Gaines, 138 U. S. 595;
Coal Co. v. Blatchford, 11 Wall. 172;
Ins. Co. v. Rhoads, 119 U. S. 237;
Knapp v. R. R., 20 Wall. 117;
Gardner v. Brown, 21 Wall. 36;

Dodge v. Tulleys, 144 U. S. 451;
Black's Dillon on Removal of Causes, Secs. 91 to 94.

The defendants in error, plaintiffs in the State court, being citizens of Missouri, suing at the instance and for the benefit of other citizens of that State, and not for the benefit of the State itself — the plaintiff in error, a citizen of the State of Kansas, as defendant in the State court, had the right to remove the case to the Federal court.

GEO. P. B. JACKSON,
For Pltff. in Error.

ARGUMENT.

The questions which are to decide this case are not new in this court. The rules that are to govern are established by numerous decisions and have been clearly defined by the court. All there is to do in this case is to make a proper application of those rules. Whether the judgment of the Supreme Court of the State of Missouri shall be affirmed or reversed depends upon two questions, the first and principal one of which is: Was the State of Missouri in reality the party plaintiff in the suit of Hickman et al. v. M. K. & T. Ry. Co., commenced in the Circuit Court of Cooper County in that State? and second: Do the facts which determine whether or not the State of Missouri was a party to that suit so appear upon the face of the record as to enable a court to determine that question without resorting to any extraneous matters?

If the State was not a party, then the case was clearly removable to the Federal court, and all proceedings in the State courts subsequent to the filing of the petition and bond for removal were *coram non judice* and the judgment of the Supreme Court of the State of Missouri should be reversed.

If the facts necessary to determine the attitude of the State do not appear upon the face of the record, although an investigation of all the facts and circumstances might result in the conclusion that

the State was the real party, still the judgment of the Supreme Court of the State of Missouri was erroneous, and should be reversed, because the Federal courts alone have power and jurisdiction to inquire into matters outside the record in order to determine the question of removability for any reason, and because the State courts had no right to proceed in the case for any purpose after the filing of a proper petition and bond making out a *prima facie* case of removability. Unless the fact that the State was a real party to this suit appeared upon the face of the record as it existed in the Circuit Court of Cooper County at the time the petition and bond were filed, then that court had no authority to proceed any farther in the case until the Federal court would investigate the ulterior matters and determine that the State was the real party, and for that reason remand the case, and unless the Federal court did so remand the case under such circumstances, the State court never could have the right to proceed. While this proposition is only secondary in importance in this case, yet it is sufficient to require a reversal of the judgment of the Supreme Court of the State of Missouri, and we may dispose of that before proceeding to a consideration of the first or principal question in the case.

I.

The facts are undisputed. The defendant within due time filed a proper petition and bond for removal of the case to the Federal court. Although no

formal order of removal was made, a transcript was duly filed in the Federal court. If the case was not removable, then the proper course to pursue was to file a motion in the Federal court to remand, and until the case was remanded the State court had no power or authority to enter a judgment. The rule concerning this matter, although confused in some of the cases, is clearly and well defined. The State court has the power before it surrenders its jurisdiction, even temporarily, to examine the papers in the case, in order to determine whether or not there is a *prima facie* case for removal made out. If there is no proper petition; or if the facts necessary to the jurisdiction of the Federal court do not *prima facie* appear upon the face of the papers; or if there is not a sufficient bond; or if for any similar reason the case is not brought within the statute governing removals, then the State court is not required to surrender its jurisdiction. At the same time the Federal court is not concluded by the judgment of the State court upon its jurisdiction, and it may examine and pass upon the same questions, but there the co-equal powers of the courts upon these removal questions cease. The Federal court may upon a proper plea, or even upon affidavits, inquire into the truth of the facts or matters stated, whereas the State court must take the facts to be as they are stated in the record and the petition for removal. In other words, the State court is governed by the face of the papers and by the statements made in them. If, in order to determine the real merit of the question of jurisdiction, it

is necessary to go beyond the statement of facts or to go deeper than the face of the papers, then the power and the jurisdiction to make that investigation is lodged solely in the Federal court. This subject is fully considered and the authorities cited in Secs. 191 and 192 of Black's Dillon on Removal of Causes.

In Sec. 191 we find, among other things, the following: —

"The question, therefore, presents itself to the State court whether, admitting the facts of the case to be as they appear in the record, and are alleged in the petition for removal, the petitioner has brought himself within the act of Congress, and made it the duty of the State court to accept the petition and bond and proceed no farther in the case; whether the formalities prescribed by the statute have been complied with and the removal papers are legally sufficient on their face to terminate the jurisdiction of the court, this question the State court has authority to determine, and must determine. Or, as it has been otherwise stated, a petition and bond upon an application to remove a case from a State court to a Federal court are based upon a right purely statutory, and must in their terms strictly comply with the provisions of the statute before the State court is ousted of its jurisdiction, and that court has a legal discretion to decline to accept the petition and bond when they are not in compliance with the statutory requirements, and to retain jurisdiction of the case. If the State court decides that the removal papers, in connection with the record, fail to show that the cause is removable, it will deny the application for removal, and proceed with the trial of the

cause. *And in that event, its action, after the final decision of the cause in the appellate court of the State, will be reviewable by the Supreme Court of the United States on error.*"

Then follows a statement and reference to authorities showing that the Federal court has also full power to decide the same question.

Then in Sec. 192 we find the following: —

"When an application for the removal of a cause from a State court to a Federal court is duly and seasonably made by the filing of a proper and sufficient petition and bond, and the removal papers, in connection with the record, show that the case is within the act of Congress, it is the duty of the State court, under the statute, to 'accept said petition and bond and proceed no further in such suit. All rightful jurisdiction of the State court over the cause immediately ceases. It makes no difference whether that court grants or refuses an order of removal. Its jurisdiction being at an end, any further step taken in the cause in that court, or any order, judgment or decree made by it, is erroneous and voidable, if not absolutely void. *And however long the question of the removability of a suit may be litigated in the Federal courts, and although those courts may ultimately decide to remand it to the State court, no valid action or proceeding can be taken in the State court before the remand.*"

See also Sec. 215 of the same work bearing upon this question.

In the case at bar it is not contended that there was any informality or insufficiency in the record or

in the petition for removal which would deprive the defendant of the right to have the case transferred. The sole point now urged is that because the State of Missouri was and is the real party in interest upon one side, therefore the case is not a removable one. This, however, is not a matter that appears upon the face of the petition. The State of Missouri is not a party *eo nomine*. There is no allegation in the plaintiffs' original petition which avers any interest of the State, nor could any court reach the conclusion that the State was in effect the real party to the suit from a mere reading of the allegations of the petition. There must be a farther investigation of the fact governing the attitude, the relations, and the interest of the parties in order to determine that question, and that being the case, under the authority above cited, it was essentially a question to be determined by the Federal court. Therefore, no matter how the question might be ultimately decided, the State court had no power to render any judgment or make any order before that question had been judicially determined by the Federal court, which alone had jurisdiction to determine it.

While I do not agree that, by looking *through* the allegations of the bill and ascertaining by investigation something that lies beyond the facts as pleaded, it will be found that the State is the real party in interest, yet I do agree that it is proper to make such investigation in order to ascertain the real interest and the real party for whose benefit the suit is prosecuted, and it may be conceded that it is

proper to do it in this case. But when we concede these things, we clearly bring the case within the rule that restricts the jurisdiction to the Federal court, at least for the purposes of the preliminary inquiry concerning the proper ultimate jurisdiction.

It becomes important to inquire: What is the face of the record that is spoken of? An examination into the practice in removal proceedings would show that in some cases the investigation was restricted to what appeared upon the face of the petition for removal. Afterwards the rule — very justly and very properly — was enlarged, so that the original pleadings in the case were to be considered, and they together with the petition for removal made the record in the case at that time, and it was from the face of all these that the court might determine. Certainly when it is said *from the face* of the record it means simply those things which are averred in the several documents constituting that record, and not such deductions and conclusions as may be made or reached by combining those pleadings, constituting the record, with other circumstances and matters outside of the record. One has only to read "the record in this case" to ascertain whether or not the State court stopped with what appeared upon the face of that, or went beyond, in order to reach the conclusion that it did. It is true no evidence was introduced, yet it is equally true that that court did take up certain matters which it dealt with as facts, not established, if you please, by the testimony of any witness, but which the court found

were established by the statutes of the State. For instance, the court says that the State has made provision for the payment of the costs and expenses of this litigation. If correct that is a fact, and nothing else. Again, the court says that in certain contingencies the State will be entitled to collect penalties and turn them into the school fund. That is another fact, and neither of these is any the less a fact because they happen to be the result of legislation. It is by using these circumstances, which are only effective in this controversy, if at all, by reason of their being facts, and it is by going out and seizing upon these supposed facts and combining them with the allegations of the petition and thereby finding an ulterior fact namely, that the State is the real party to be benefited or affected, that that court reaches the conclusion that the State is the real party in interest. Waiving for the present the soundness of any argument which the court in its opinion bases upon these circumstances, I submit that if evidence had been introduced to establish the fact that the State had made certain money available for the expenses of the suit, or that it would have the opportunity to realize certain moneys under certain contingencies, there could be no question but that the investigation in connection with such facts must be made exclusively by the Federal court. That the evidence relied upon by the court to establish these facts is to be found in the statutes of the State does not change the nature of the case. It is still an investigation of something beyond that which ap-

pears upon the face of the record, and when the court proceeded to consider the case as it did, and treat the question in the manner that it did, it violated that rule of law which limits the power to make such investigation to the Federal court, and did it without ever considering the above rule of practice.

When the defendants in error invoke the rule which they do, they at once concede that upon a reading of the petition it does not appear that the State is the party in interest. By the argument adopted, they establish the proposition that upon the face of the petition and record some one else than the State is the party, and in order to assert and maintain the proposition which they submit against the jurisdiction of the Federal court, they say that the court is not restricted to the face of the petition, which leads to another conclusion, but that it "will look beyond the parties appearing of record to determine the real party in interest," and will look through the nominal parties plaintiff," and if as the result of this investigation, they discover that some other party than as appears upon the face of the petition is really the party interested in the suit, then they will determine the jurisdiction accordingly; but that means not that the State court *may* do that, but that it *must* be done by the Federal court. As already shown, the State court is restricted to the facts as stated in the petition. If any farther investigation is necessary, if there is to be any looking beyond the parties appearing of record, or if there

is to be any looking through the nominal parties plaintiff, that must be done by the Federal court, and if upon such an investigation it is determined that the cause ought not to be removed, then it is to be remanded by a proper order of the Federal court, and thereupon the jurisdiction of the State court will re-attach, and it may thereafter proceed, but before such proper order of remand by the Federal court the State court is without jurisdiction, and for this reason the Circuit Court of Cooper County should not have proceeded to a trial of the case, for that reason its judgment was void, and the judgment of the Supreme Court of Missouri affirming it should be reversed, even in the absence of any other objection.

II.

Independently of the question of what court shall determine who is the real party to the case, we have the more important and decisive proposition, and that is that the State of Missouri is *not* a party to this suit in any sense. The question has been fully considered by this court in the case of Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. While it is true that was not a case of removal, yet it was one in which the jurisdiction of the Federal court was attacked upon the identical question now presented in this case, and in the opinion of the court by Mr. Justice Brewer the jurisdiction was sustained. That was a suit commenced by the Farmers' Loan & Trust Company as trustees in a mortgage upon the International & Great Northern Railroad in

Texas against the defendants, John H. Reagan, William P. McLean and L. L. Foster, Railroad Commissioners of the State of Texas, and Charles A. Culbertson, Attorney-General of the same State, to perpetually enjoin said Railroad Commission and the Attorney-General from instituting any suits for penalties under the law of Texas, or under or by virtue of the tariffs established by said Railroad Commission, and also to perpetually restrain said Railroad Commission from issuing any farther tariffs, and from doing various other acts which they claimed the right to do by virtue of the law of the State of Texas.

The opinion in the case commences as follows: —

"The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties.

We are met at the threshold with an objection that this is, in effect, a suit against the State of Texas, brought by a citizen of another State, and therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a State is to be treated as an action against the State has been of late several times carefully considered by this court, especially in the cases of Ex parte Ayers, 123 U. S. 443, and Pennoyer v. McConnaughy, 140 U. S. 1."

Then follow quotations from various cases to the effect that the Federal courts will investigate and ascertain who is the real party regardless of the

nominal party, and pointing out the different classes of cases where it will be held that the State is the real party or otherwise.

Then the opinion proceeds: —

"Appellants invoke the doctrines laid down in these two quotations, and insist that this action cannot be maintained because the real party against which alone in fact the relief is asked and against which the judgment or decree effectively operates, is the State, and also because the statute under which the defendants acted and proposed to act is constitutional, and that the action of State officers under a constitutional statute is not subject to challenge in the Federal court. We are unable to yield our assent to this argument. So far from the State being the only real party in interest, and upon whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form, the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the Treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this

case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, State and Federal, is in restraining the collection of taxes, illegal in whole or in part."

Then follow some other reasons not necessary to quote here, and the opinion concludes upon that subject as follows: —

"Our conclusion from these considerations is that the objection to the jurisdiction of the Circuit Court is not tenable, and this whether we rest upon the provisions of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States."

The Federal courts have no jurisdiction over a case to which a State is a party, whether it be removed from a State court or be originally instituted in a Federal court. The same reasons and the same rules govern in either case, and therefore the reasoning and the decision in the case just mentioned apply to the case at bar. Unquestionably, under that decision, the Federal court had jurisdiction of the case at bar, and consequently the Circuit Court of Cooper County did not have jurisdiction. I have not found any later case yet reported upon this direct question. It is a fact, however, that recently a number of similar suits have been instituted in the State of Texas against the railroad commissioners in that State and the Federal courts have entertained jurisdiction, and

have granted perpetual injunctions, and now the jurisdiction in such cases is generally conceded. The circumstances of the case against the Texas commission afford stronger grounds for contending that the case was against the State than those in the case at bar. There the purpose was to restrain those defendants who were officers of the State from doing certain things which they claimed the right and power to do by virtue of the laws of the State. The suit against them was to enjoin them from discharging what they claimed was their official duty, and, among other things, to enjoin them from attempting to recover penalties prescribed by the State law. Upon the face of that suit it would seem that their action was for the benefit of the State, but the court looked into the matter far enough to ascertain that in fact the people to be benefited by the acts which were restrained were only a portion of the community who might be interested as shippers over the railroad there involved. An examination of the case at bar will show that the State of Missouri could not be as much interested in or as much affected by this suit as the State of Texas might have been in the suit against her railroad commission, and therefore I say that under that decision the State of Missouri cannot be regarded as a party to this suit. In order to understand just what is involved in this case, we must consider the petition originally filed in the Cooper Circuit Court, and also the statute under which the plaintiffs allege they were acting. The original petition set forth at pp. 10 to 12 of the printed record shows the interest that

was involved, and the interest to be affected by this suit, as well as the cause of its being commenced.

On page 11 it is averred: —

"That informal complaints have heretofore been made to plaintiffs as the Board of Railroad and Warehouse Commissioners aforesaid, that arbitrary, illegal, and improper charges had been made by said defendant for carrying passengers and freight over that portion of defendant's said road which passses over said bridge; that plaintiffs, under the authority given them as the Board of Railroad and Warehouse Commissioners aforesaid, proceeded, on the 16th day of July, 1895, after formal notice had been given to defendant, to examine into and determine upon the reasonableness of the charges made by said defendant for carrying freight and passengers over the bridge aforesaid; that it was disclosed by said examination that the defendant was charging more for carrying passengers and freight over said bridge than is authorized by law."

Then follow averments of what charges were exacted and what were lawful, and then a farther averment that having made the investigation aforesaid, the plaintiffs as Railroad Commissioners had ordered that such excessive charges should be discontinued, and that the defendant was disregarding such order, and therefore they pray that an injunction issue to restrain the railroad company from further continuing to violate the law and the finding of the plaintiffs as Railroad Commissioners, and that obedience to the order of such Commissioners be required of the defendant. Here was no effort to recover any

property belonging to the State, nor to recover any money belonging to the State, nor to enforce any penalty exacted by the State, but simply to regulate the charges which might be made against certain passengers and shippers on account of transportation over the defendant's railroad. In other words, it was to regulate a matter between the railroad company on one hand and such individuals as might become passengers or shippers on the other hand. The real controversy was between the defendant and those persons who had made the informal complaints to the board upon some former occasion. The parties to be beneficially affected by the judgment against the defendant were those persons who had made the complaints or who might avail themselves of the rights that would be enforced under a judgment against the defendant in this suit; but in no sense, and to no extent was the State a party any more than, as was said by this court in the Texas case, that it had an interest in a governmental sense in which every State is interested in seeing its citizens protected.

The *ex parte* evidence introduced by the plaintiffs upon the so-called trial in the cooper Circuit Court shows that the State was in no sense interested in this proceeding, but simply that certain citizens of Boonville were seeking to correct a supposed grievance on account of charges made for toll by the Boonville Bridge Company.

If we turn to the statute under which the plaintiffs assumed to act in making the order referred to in their petition, we find that this view of the matter is em-

phasized. Section 2653 of the Revised Statutes of Missouri of 1889 is the immediate authority for bringing this suit. The preceding sections relate to those things which are preliminary to the making of the order by the Railroad Commissioners. If it were a proper occasion to inquire into the merits of the action of the Commissioners there would be no difficulty in showing that they had absolutely disregarded the very statute under which they assumed to act, but it is not necessary to consider that question now, and it is only necessary to notice the provisions of Sections 2646 and 2653, as follows:—

"Section 2646. **Commissioners to see to enforcement of act — Investigate complaints.** — It shall be the duty of the railroad commissioners of this State to see that the provisions of this act are enforced. When complaint is made in writing by any person having an interest in the matter about which complaint is made, that any rate or rates established by any common carrier are unreasonable, unjust or extortionate, or that any of the provisions of this act have been or are being violated, it shall be the duty of said railroad commissioners to proceed at once to investigate such complaint, and determine the truth of the same. * * *"

"Sec. 2653. **Proceedings when order of commissioners is disobeyed — Circuit Court — Enforce or renew order — Proceedings.** — Where the complaint involves either a PRIVATE or a public question as aforesaid, and the commissioners have made a lawful order or requirement in relation thereto, and where such common carrier, or the proper officer, agent, or employe thereof, shall violate, refuse, or neglect to obey any such order or requirement, it *shall be lawful* for the board of railroad commissioners, *or any person or company interested in such order or requirement*, to apply in a summary way, by peti-

tion, to any Circuit Court at any county in this State into or through which the line of railway of the said common carrier enters or runs, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable. And such notice may be served on such common carrier, its officers, agents, or servants, in such manner as the court may direct; and said court shall proceed to hear and determine the matter speedily in such manner as to do justice in the premises; and to this end said court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as may seem needful to enable it to form a just judgment in the matter of such petition. On such hearing the report of said commissioner shall be *prima facie* evidence of the matter therein stated; and if it be made to appear to the court on such hearing, or on report of such persons appointed as aforesaid, that the lawful orders or requirements of such commissioners drawn in question have been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation of such order or requirement of said commissioners, and enjoin obedience to the same. If such court shall hold and decide that any order of said board of railroad commissioners involved in such proceeding was not a lawful order, said court shall, without any reference to the regularity or legality of the proceedings of said board or of the order thereof, proceed to make such order as the said board should have made, and to enforce said order by the process of said court, and to enforce and collect the forfeitures and penalties herein provided in all respects according to the provisions of this act. And in case of any disobedience of any such injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or other proper process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and

if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other persons failing to obey such writ of injunction or other process, mandatory or otherwise; and said court may make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of one hundred dollars per day, for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such money shall be payable to the school fund of the county in which such proceeding is pending; and payment thereof, may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by final decree *in personam* in such court. When the subject in dispute shall be of the value of one hundred dollars or more, either party to such proceeding before such court may appeal to the proper appellate court in the State, in the same manner that appeals are taken from such courts in this State in other proceedings involving like sums of money; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless stay of proceedings be ordered by the court from which the appeal is taken, or by the appellate court to which the appeal is taken, upon the application of the appealing party. Whenever any such petition shall be filed by the commissioners as aforesaid, it shall be the duty of the attorney-general, when requested by said commissioners, to prosecute the same. All proceedings commenced upon such petition shall, upon application of the petitioner, be advanced upon the docket and take precedence of any other case upon the docket except criminal cases. The costs of such proceedings may be, with the approval of the attorney-general and governor of the State, when such suit is brought by any private person, and when brought by said commissioners shall be ordered by the commissioners to be paid, in the first instance, out of any money in the treasury not other-

wise appropriated; and if upon final hearing the decision is against the said common carrier or other person against whom the proceeding is being prosecuted, such common carrier or person shall be liable for the costs, for which judgment may be rendered as in any other case. (Laws 1887, p. 25, extra session.)"

The opening sentence of the last section seems to refute the contention of the defendants in error that they are in effect the State of Missouri, for it authorizes the action where the complaint involves either a *private* or a public question, and the commissioners have made a lawful order or requirement in relation thereto. It thus appears from the very terms of the statute under which they were proceeding that it related or might relate to *private matters*. Will anyone contend that the action of the commissioners in regard to a *private* matter will make the State a party to any suit that may be brought on account of those private questions? As already shown, the record in this case establishes that the action taken was at the instance of certain *private citizens*, and on account of their interest in the rates that were being charged.

The section farther provides that if the order referred to shall be violated by a common carrier, then it shall be lawful for the Board of Railroad Commissioners, *or any person or company interested in such order or requirement* to apply in a summary way by petition to any Circuit Court, etc., that is, to bring a suit of the kind now before the court. So far from being a proceeding in the interest of the

State, or a proceeding which in effect is by the State, *any individual or any company* having any interest in or being affected by the requirement that may have been made may bring a suit on account of its violation. Under this statute, and for the purposes of a suit under this statute, the Railroad Commissioners stand in no different attitude from any other citizen of the State who may have an interest in or may be affected by the rates charged by the common carrier. The Railroad Commissioners were no more charged with the duty of bringing this suit than was the interested citizen. They were not compelled to sue. It was at their option to sue or not. The citizen could bring the suit in his own name to accomplish exactly the same purposes that would be accomplished by a suit commenced by the Commissioners in their names. Would it be contended, if one of these interested citizens had brought a suit in his own name, that it was not removable because the State of Missouri was the real party in interest? Certainly not. The State would have identically the same interest in a suit so brought by the citizen that it can have in this suit brought by the Commissioners. The object to be accomplished is the same no matter who is the nominal plaintiff. The right involved is the same. The manner of procedure is the same, and since there is no difference whatever in any of the elements or features of the case whether brought in the name of the Commissioners or other citizens, and since it must be conceded that the State could

not be regarded as a party if the individual citizen was the nominal plaintiff, then upon what reason can it be claimed that the State is to be regarded as the real plaintiff when by mere chance the Railroad Commisioners are the nominal plaintiffs? If the suit to accomplish the same purposes, to assert the same rights of shippers, to relieve the shippers from the same burdens and embarrassments, when brought by one of those shippers is removable to the Federal court, then why should not another suit, although conducted in the name of the Railroad Commissioners, but brought for the same purposes, to vindicate the same rights, and to prevent the same wrongs, also be removable to the Federal court? I submit that when we consider the sort of case presented in the petition, and when we consider the provisions of the statute under which the suit was brought, and then do what the Federal courts alone may do, and what we are asked to do here, viz., look beyond the parties appearing of record to determine the real party in interest, we will find that that real party is not the State of Missouri, but the shippers and passengers living in Boonville and other points south of the Missouri river who may desire to travel or ship across the Boonville bridge. The real controversy in this case is between such shippers and passengers on the one hand and the railroad company on the other, and the State of Missouri has no more interest in having an enforcement of the laws applicable to this sort of controversy than it has in the enforcement of the law which protects every citizen in his

person and in his property — that is, an interest in a governmental sense, but not an interest which is to designate the State as a party to a suit that may arise under any of these different laws. The conclusion, therefore, must be that this was a controversy between citizens of different States, and therefore it was removable from the State to the Federal court, and the application for removal having been made in due time, and in due form, the Circuit Court of Cooper County had no farther jurisdiction over the case.

The Supreme Court of Missouri, however, has reached a different conclusion in the opinion set forth at pages 47 to 57 of the printed record; while the U. S. Circuit Court, through Judge Philips, has sustained the contention of the plaintiff in error in overruling a motion to remand this case to the State court. (See opinion in Hickman et al. v. M. K. & T. Ry. Co., 97 Fed. Rep. 113.)

It therefore becomes important for us to examine the opinion of the Supreme Court of Missouri to ascertain if its judgment is sustained by reasons sufficient to justify its affirmance, or whether it is so grounded in error that it must be reversed.

The Supreme Court of the State in effect concedes all that we claim, and admits that the State cannot be regarded as the real party, unless it appears that it has a substantial pecuniary interest in the case, and that court reached the conclusion that the State was the real party because it satisfied itself that the interest of the State was not a governmental interest, but that of an individual litigant

which was to be directly affected by the decree that might be entered in the particular case; that it had a monetary interest in that decision because of a certain collateral arrangement for the payment of the expenses of the Railroad Commissioners, and because of a possible ulterior liability of some one to pay a penalty. Unless this liability for costs, and this probable chance of recovering a penalty can be sustained and be so immediately connected with the present suit as to say that they are the direct and necessary consequence of that suit then I submit that the whole argument of that court must fail. As already said here, and as said by the court in its opinion, the State is not by name a party to this suit. There is no allegation that the suit is instituted or prosecuted for the interest or benefit of the State, but it is said upon the strength of the case of Ferguson v. Ross, 38 Fed. 161, that the courts will look "beyond and through the nominal parties to the record" to ascertain who are the real parties to the suit. If the court had more carefully examined that case it would have discovered that it was a suit brought *directly for the specific and sole purpose of recovering a certain sum of money due to the State of New York by way of penalty*, and moreover the court would have discovered that it was a suit *criminal in its nature*, while everybody knows that it is only "civil suits" that are removable from the State to the Federal courts. These points were made by the court in its decision of the Ferguson-Ross case. They were decisive of that case without looking "through or beyond

the nominal parties to the record," and all that was said concerning that feature of the case may be considered as mere obiter. With all respect to the Supreme Court of Missouri, it does seem very strange that such an unnecessary expression in a Circuit Court decision, made a number of years ago, should be put in the scale and be considered of sufficient weight to balance if not to overcome a recent unanimous opinion of this court.

From an examination of the cases cited in the case of Ferguson v. Ross, it will be found that there is not one of them that bears any similarity either to the case at bar or to the case of Ferguson v. Ross. In several of them the States were parties *eo nomine*. In others the State was the nominal plaintiff to the use of a certain relator named, and in these latter cases it was held that the State was not a party in fact and that the citizenship of the relator would control. The other cases were suits one against the Governor, the other against other officers which were attempts to force these officials to do certain acts for the State, which suits it was held could not be maintained. A more careful examination of the authorities will disclose that wherever the courts have undertaken to "look beyond or through the allegations of the petition" to ascertain the real party in interest it has been where efforts have been made to evade the law which says that a State may not be sued without its own consent. In order to evade this suits have been brought against certain officials of States when in reality the cause of action was against the State itself. In such cases

the courts may well hold that such attempts are but frauds upon the jurisdiction of the court, as well as against the State interested, and therefore jurisdiction will not be entertained in such cases, but certainly such cases are not authority for saying that, when the State has authorized a suit of a certain character to be brought by a particular individual, whether official or otherwise, for the benefit of certain complaining citizens, the State is to be regarded as a party to such suit.

But even if the State court was justified in attempting to conduct an investigation in order to discover what interests are possibly concealed behind "the face of the record" in the case, I insist that it cannot by any reasonable deduction find that the State has any interest in this suit, except as the remotest possibility, and in a collateral way. As already said, the interest which the opinion in this case assumes as the foundation for its conclusion is that the State may pay the costs of this case, or may reimburse the plaintiffs if they pay the costs, or that, in a possible future contingency, there may a penalty attach which the State would be entitled to recover for the benefit of the school fund. Unless one or the other of these two things is sufficient to support the conclusion of the court, then it must fall. It cannot be contended that the State has any interest upon either of these theories as a *direct result* of this suit. Let the decision be as it may, yet, in any event, there will be no judgment which can be enforced against the State, nor upon which it can enforce the collection of a dollar. If the decision is adverse to

the plaintiffs, a judgment for costs under the practice in Missouri will go against them and they must pay it. But, says the opinion in this case, the State by statute has made provision to defray the expenses incurred by the commission. Whether or not the State may ever contribute one cent to the payment of these costs depends upon several other things besides the judgment in this case. It certainly will not follow from the judgment of the court alone that the State shall pay any part of the costs. Even if there is a judgment against the plaintiffs for costs, it is not that judgment which will take any money from the State, but it is first a requisition by the Railroad Commission, and next the drawing of a warrant by the State Auditor, and before these can result in actual outlay by the State, the State Treasurer must have set apart sufficient money to this particular fund, and then he must pay the warrant, and if any one of these parties refuse to do any one of these several acts, namely, making the requisition, drawing a warrant, setting apart the money or paying the amount, the defendant in this case can have no power and could resort to no process whatever to enforce the payment in that way. The judgment of the court would be utterly futile so far as enforcing the payment of any costs from the State is concerned. I submit it is not the possible conduct of any official of the State that determines the effect of a judgment. It is not the possible future policy of the State with regard to a particular matter that may determine its relation to a case. For the purpose of deter-

mining whether the State is a party to this suit our inquiry must be restricted alone to the question, Can any judgment that might be rendered operate directly upon the State one way or the other? That is the only reasonable view to take of the matter. Under that view, I submit that so far as this statute providing for the expenses of the Railroad Commission is concerned, it has no application whatever to any question that is pertinent for consideration in this case, and it does not to any extent whatever tend to establish a liability on the part of the State which can make the State a party to this suit. For the purposes of this argument it is entirely proper to say that the State of Texas has made provision for defraying the expense incurred by her Railroad Commissioners. This very possibility of the State paying the expenses of the litigation in which Railroad Commissioners may be concerned, must have been present in the case of Reagan et al. v. Farmers Loan & Trust Company, decided by this court. It is not a matter that could have escaped the attention of all the attorneys concerned in that case, and of all the members of this court, and we must therefore conclude that in the minds of those attorneys and of the judges of this court that proposition amounted to nothing, and therefore the court held that the State was not a party, notwithstanding the very same possibility that the State, through the operation of some collateral statutory provision, might ultimately pay the amount involved in the costs of the case, just as such a possibility may be present in this case.

The only remaining foundation for the opinion in question is the possibility that at some time in the future the State might have the right to recover a penalty from the defendant in this suit. It ought not to require any argument to show that that could not be the result of this case, nor the effect of any judgment in this case. Let us see what is this theory that the court has seized upon as a basis for the conclusion that the State is the real party in interest in this case. Surely the judgment which the Circuit Court of Cooper County assumed to render in this case in favor of the plaintiffs does not impose any penalty, nor direct the payment of any sum of money, nor contemplate the recovery of any sum of money by the State. It is therefore not the direct and immediate effect of the judgment actually rendered that can give the State a right to collect and recover any money from the defendant.

In the opinion it is said: —

"The State is moreover pecuniarily interested not only by reason of the liabilities it incurs in the action but because of its pecuniary interest in the judgment which may be obtained, and which when pushed to final extremity of execution may result in the payment of penalties, not directly into the State Treasury, it is true, but into the treasury of one of its political subdivisions for the benefit of the public schools." (Record, p. 56.)

This supposed pecuniary interest of the State, un-

der the views of that court, is thus made to depend upon a succession of contingencies which may never happen. Under the terms of the statute itself it is only "in case of any disobedience of any such injunction or other process" that it shall be lawful for the court to proceed to the enforcement or collection of any penalties or other sums of money against the defendant. That is to say, the only right that the State can ever have to recover any money is upon the institution of a farther proceeding which may be original, or which may be ancillary to the present one, but it certainly requires some other proceeding before the State can collect any money from the defendant, and the foundation of that other subsequent and necessary proceeding cannot have arisen until after a complete determination of the present case and a disobedience of the judgment which may be rendered in this case. The subsequent proceeding that might be started by the State to enforce the collection of a penalty from the defendant may not be removable, but that does not establish the proposition that the present case is not removable. Moreover, there is no certainty that the contingency will ever happen which is to give the State the right to institute the subsequent proceeding for the enforcement of the penalty and the collection of the money which constitute its supposed pecuniary interest. How can any court, either on original trial or in review of this case, say that the defendant will be guilty of such disobedience as would warrant the institution of such subsequent proceeding? How can any court prejudge the parties so as

to say that the State has a pecuniary interest because a party to the suit *will* at some future time disobey the judgment of one of the courts of the State. In all matters not already established by evidence, direct or circumstantial, of what has taken place, all that the courts can do is to deal in presumptions, and there is no presumption more firmly established and more universally applied than the one that every one is presumed to obey the law. There can be no presumption, and there should be none, to the effect that the defendant will disobey any judgment of any court, and unless the courts are justified in indulging a presumption that it will do so, there is no possible ground upon which it can be said that the State will ever have the right to recover a penalty from the defendant. There is absolutely no substance whatever to the theory that the State has any pecuniary interest in any possible penalties to arise out of the disobedience of the judgment of the court. It is the merest shadow, and upon that intangible and shadowy thing rests the decision of the Supreme Court of Missouri in this case.

The court concedes that there are two classes of parties who may proceed under the statute, first "the Board of Railroad Commissioners," second, "any person or company interested in any such order or requirement."

Then the opinion proceeds:—

"Now while in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest, it is not so in actions under the statute by

persons of the first class, its Board of Railroad Commissioners." (Record, p. 56.)

With all due respect to that court, the statute makes no such distinction as is attempted in the opinion. It provides exactly the same proceedings to enforce penalties in case of disobedience of a judgment rendered in such proceeding whether it had been instituted by either of these classes of parties or the other — either by the individuals constituting the Board of Railroad Commissioners or by shippers or passengers as interested parties. The same right to proceed for the enforcement and collection of a penalty for the benefit of the school fund exists in one case as in the other. Therefore, if the argument is sound in one case it ought to be in the other, and ought to establish that in all cases the State is the party in interest no matter in whose name the suit may be brought. But again, what difference is there in the object of the suit whether it be brought in the name of the Railroad Commissioners or in the name of an individual shipper or passenger? The purpose is not to collect money. It is to secure an adjustment and a fixing of rates which shall be the limit to which a railroad company can go in the transaction of the business of a common carrier. Unless the State is the shipper or is the passenger it has no direct and immediate interest in the fixing of such rates. It has no possible interest in such a controversy other than it may have in any controversy which may arise between different classes of the citizens and residents within its borders. It has a govern-

mental interest in seeing that the rights of all are regarded, and that just laws are enforced, and it has no other interest in such a controversy as is involved in this case.

The same contentions were made and the same questions considered on the motion to remand this case from the United States Court, and in a carefully considered opinion Judge Philips held that neither the collateral possibility of the State assuming to pay the costs, nor the remote contingency of realizing something for the school fund was a sufficient pecuniary interest to make the State a party to this suit.

Concerning the latter proposition, he says: "This suggestion cannot command my assent. Such subsequent proceedings, from which such penalties could result, do not inhere in the pending action at bar. They would be essentially contingent and separate. The subsequent action might never arise, as the defendant company might conform. It would also be entirely optional with the railroad commissioners, and any individual interested who is equally authorized to institute such proceedings, whether or not they would ask the court to proceed summarily against the offending roads. Independent of any statutory provision, the State court, in the exercise of its inherent power, could impose a fine for the violation of such injunction, in a contempt proceeding; and such fine, under the general law of the State, would go to the State. And if this fact suffices to constitute the State a party in the original injunction suit, then by the same logic might it be

maintained that the State, in legal contemplation, is a party to every civil suit of injunction."

The opinion also points out that the laws of Texas and Nebraska contain similar provisions concerning costs and penalties, and that neither of these circumstances was considered, either by the attorneys or by the court, as affecting the question of jurisdiction, which was attacked on the ground that the State was the real party. Hickman et al. v. M. K. & T. Ry. Co., 97 Fed. 113.

Another reason why the decision of the State court is wrong is to be found in the statutes of the State. Sec. 1991, R. S. of Mo. 1889 (that section being part of the Code of Practice of the State) provides: —

"An executor or administrator, a trustee of an express trust, or *a person expressly authorized by statute may sue in his own name* without joining with him the person for whose benefit the suit is prosecuted."

Sec. 2653 *expressly* provides that in any case where a common carrier shall violate, refuse or neglect to obey any lawful order or requirement of the board it shall be lawful for the Board of Railroad Commissioners or any other person or company interested in such order or requirement to apply in a summary way by petition to any Circuit Court, etc. Here is direct statutory authority for either one of the classes of persons to bring the suit contemplated by this statute and by virtue of Sec. 1991, they may bring it in their own name without joining any other party for whose benefit the suit is prosecuted. All

the time the suit commenced under Sec. 2653 is to compel an observance of the lawful order or requirement of the Board of Railroad Commissioners. As the object of this suit is the same no matter who may institute it, those persons who are to derive benefit from the observance of the order of the board, and those alone, are the parties for whose benefit the suit is prosecuted. As it is to compel an observance of the order of the commissioners in regard to the rates which may be charged for carrying passengers and freight, then it is clear that only passengers and shippers are to be benefited. Therefore, this suit authorized by the statute to be brought in the name of the commissioners, or in the name of some individual or company interested, is a suit to be prosecuted in the name of such party for the benefit of the passengers and shippers who may be affected by these rates, and not a suit prosecuted for the benefit of the State of Missouri, as a party. It has been decided time and time again that the jurisdiction of the Federal courts, so far as the question of parties is concerned, depends upon the citizenship of administrators, executors, trustees, receivers, and others similarly situated, and not upon the citizenship of the beneficiaries of such parties. The effect then of the several sections of our statute is to make either the railroad commissioners or any other interested party the trustee of an express trust to maintain a suit for the benefit of the persons interested in the rates that may be charged for transporting passengers or freight. It is the citizenship of these trustees that is to determine the right

to remove this case, and not the condition of the party for whose benefit the suit is brought. Therefore, even if it could be said that the State has any interest in this case, it must be that of a beneficiary in the trust created, and not such a relation to the case as to determine the jurisdiction of the Federal court.

But, as we have just seen, the suit is brought for the benefit of those persons interested in the rates to be charged for the transportation of passengers and freight; that is, for the benefit of others than the State of Missouri, and therefore the State cannot be regarded as a party even in the relation of the beneficiary of the proceeding.

It may not be amiss to remark here that the very provision for paying costs, which the court relies upon as one ground for its decision, applies as well to cases instituted by the second class of parties mentioned by the court, namely, any person or company interested in such order or requirement, as it does to the first class, namely, the Board of Railroad Commissioners. The argument based upon that provision of the law, therefore, cannot be consistent with the distinction which the court makes between these two classes of parties who may commence these suits, for the court also says that "in actions under the statute by persons of the second class, which generally will be shippers or passengers, the State has no pecuniary interest." That undoubtedly is true, and yet it has no more pecuniary interest, and no different sort of an interest in any suit commenced by the Railroad Com-

missioners, from the interest it has in a suit brought by anyone else, because the object of the suit is always the same, because the provision concerning costs applies to both alike, and because the provision concerning the possible enforcement of a penalty at some future time applies as much to one as to the other. I beg to direct attention to another matter in which that court seems to have fallen into error concerning the case of Reagan v. Farmers Loan & Trust Company. The court says that that suit commenced in the Federal court was one "assented to by the State in the act creating the commission." The decision of this Court in that case was not made to depend upon any such provision in the statute. Wholly independent of anything contained in the statute, this court expressly and clearly decided that that proceeding was not a suit against the State, and that the citizenship of the members of the Board of Commissioners was available to determine the jurisdiction of the court. While it is true that Mr. Justice Brewer, in his opinion, adverted to a section of the statute providing for the institution of a suit *against the commissioners*, it was done by way of argument to show that the suit was *not* one *against the State*, and that must have been the conclusion, otherwise the Federal Court could not have entertained jurisdiction. If, however, the question of assent is to cut any figure, and if the section of the Texas statute authorizing the institution of a suit against the Board of Railroad Commissioners had the effect to determine the relation of the various persons to that case, so as to lead to the conclusion

that the State was not a party, then clearly the statute of Missouri which authorizes the institution of a suit by certain parties was giving as much assent to the institution of this suit as did the Texas statute give assent to the suit under it, and if the assent under the Texas statute prevents the State of Texas being regarded as a party to that suit, then it is irresistible that the assent given by the statute of Missouri prevents that State from being a party to the suit under her statute.

I have purposely omitted any reference to those cases which sustain the jurisdiction of the Federal courts in suits against State officers attempting to perform duties to and render services for the State under unconstitutional laws. It is not necessary to resort to the reasoning or logic of those cases. Like the case of Reagan v. Trust Company the case at bar does not depend upon the unconstitutionality of any law to sustain the jurisdiction of the Federal court. The decisive question in this case is: who is the party to be benefited by the result of the suit brought in the name of the defendants in error? Who is to gain or lose by the result of that case? If the State of Missouri will gain or lose as a direct pecuniary effect of the suit then it is the real and substantial party and the United States Circuit Court could not entertain jurisdiction. On the other hand if only certain citizens, interested as shippers or passengers on the Missouri, Kansas and Texas Railway, could derive any practical benefit from a judgment in favor of the plaintiffs in that suit, or suffer any substantial inconvenience from a contrary judg-

ment, then the State cannot be regarded as a party, and the United States Circuit Court was right in refusing to remand the case, as shown by the report in 97 Fed. 113.

I submit that the latter view is the only one that can be entetained in this case, and therefore the judgment of the Supreme Court of Missouri should be reversed.

GEO. P. B. JACKSON,
For Plaintiff in Error.